

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 8, 2003

IN RE:

PETITION OF US LEC TENNESSEE, INC.
FOR DECLARATORY ORDER

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DOCKET NO.
02-00890

ORDER DENYING JOINT MOTION TO STAY PROCEEDINGS,
MODIFYING PROCEDURAL SCHEDULE
AND SETTING HEARING DATE

This matter is before the Pre-Hearing Officer on the *Joint Motion to Stay Proceedings* ("Motion") filed by Petitioner US LEC Tennessee, Inc. ("US LEC") and Respondent Airstream Wireless Services, Inc. ("Airstream") on May 6, 2003.

In the *Motion*, the parties request that the instant proceedings be stayed until "two potentially similar cases now pending before the Federal Communications Commission" ("FCC") are decided.¹ While the parties agree that an FCC decision in the two cases would not bind the Tennessee Regulatory Authority ("Authority" or "TRA"), they contend that the FCC's investigation and conclusions could be helpful in resolving the instant action. The *Motion* states that copies of both court decisions referring the cases to the FCC were filed with the TRA.

Presumably, the two cases referred to in the *Motion* are two unpublished cases from the Eastern District of Pennsylvania that US LEC filed on March 19, 2003 in

¹ *Petition for Declaratory Order*, Docket No. 02-00890, *Motion to Stay Proceedings*, p. 2 (May 6, 2003). (The parties define the principal issue in the case presently before the TRA as "whether US LEC properly invoked the anti-fraud provision of its tariff and terminated service to Airstream," and maintain that there are "striking parallels among all three lawsuits.").

support of its *Brief on the Jurisdiction of the Tennessee Regulatory Authority: Audiotext Int'l, LTD. v. MCI Worldcom Comm., Inc.*, 2001 WL 1580316 (E.D. Pa. 2001) and *Audiotext Int'l, LTD v. AT&T Corp.*, CA 00-5010 (E.D. Pa. Jan. 17, 2002). In both those cases, Audiotext International, LTD ("Audiotext") entered into contracts in which competing telecommunications carriers ("CLECs") agreed to provide international telephone service lines for Audiotext's use. Subsequently, the CLECs purportedly observed a high volume of call traffic that they deemed fraudulent and terminated service.

Audiotext filed separate breach of contract suits against both CLECs in the Eastern District of Pennsylvania in 2000. The CLECs, MCI Worldcom Communications, Inc. ("MCI") and AT&T Corporation ("AT&T"), each sought dismissal based upon the doctrine of primary jurisdiction.

On December 11, 2001, the district court granted MCI's Motion for Dismissal Pending Administrative Hearing without prejudice. The court reasoned that the case should be deferred to the FCC for a determination of the meaning of several terms in the tariff, including the word "fraud," in the context of telephone traffic in the telecommunications industry.² On January 17, 2002, the court granted AT&T's motion to dismiss without prejudice, in deference to the FCC's primary jurisdiction.³ The court determined, in the interest of consistency, to follow the same course taken in the MCI case.⁴

² See *Audiotext Int'l, LTD v. MCI Worldcom Comm., Inc.*, 2001 WL 1580316 at * 5 (E.D. Pa. 2001) (The court also indicated that, had the statute of limitations created a risk of prejudice to Audiotext, it would have simply stayed the proceedings before it).

³ See *Audiotext Int'l, LTD v. AT&T Corp.*, CA 00-5010, p. 1 (E.D. Pa. Jan. 17, 2002).

⁴ See *id.*

At this time, neither of these cases have been filed with the FCC.⁵ A stay pending the resolution of FCC proceedings that have not yet commenced is inappropriate and will cause undue and unnecessary delay. Moreover, the language in the tariffs that is to be construed by the FCC differs from that at issue in the instant case.

The Procedural Schedule issued on April 23, 2003 shall be modified as follows:

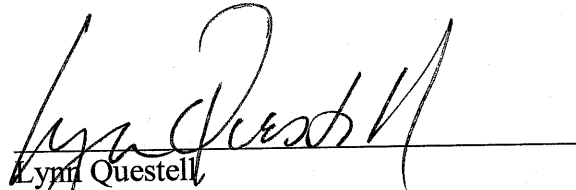
Procedural Schedule

- The parties shall file a proposed Issues List no later than **Monday, May 12, 2003**;
- The Issues List will be issued no later than **Wednesday, May 14, 2003**;
- Discovery Requests shall be filed with the Authority and served on all parties no later than **Friday, May 16, 2003**. Discovery Requests shall conform to Tenn. Comp. R. & Reg. 1220-1-2-.11(5);
- Responses to Discovery Requests shall be filed with the Authority and served on all parties no later than **Tuesday, May 27, 2003**;
- Pre-filed Direct Testimony shall be filed with the Authority and served on all parties no later than **Tuesday, June 3, 2003**;
- Pre-filed Rebuttal Testimony shall be filed with the Authority and served on all parties no later than **Thursday, June 12, 2003**;
- A Hearing in the above styled case will be held on **Tuesday, June 17, 2003 at 9:00 a.m.** in the ground floor Hearing Room at 460 James Robertson Parkway, Nashville, Tennessee. Participants with disabilities who require special accommodations or alternate communications formats should contact the Tennessee Regulatory Authority ADA-EEO/AA Coordinator/Officer, 460 James Robertson Parkway, Nashville, Tennessee 37243-0505 or 1-800-342-8359 so that reasonable accommodations can be made.

⁵ Counsel for Audiotext indicated that he would not be seeking FCC involvement in the MCI case due to its recent bankruptcy. He also expressed his intent to file the AT&T case with the FCC in the near future, with a projected filing date of May 9, 2003.

IT IS THEREFORE ORDERED THAT:

1. The *Joint Motion to Stay Proceedings* is denied.
2. The Procedural Schedule is modified as stated herein.



Lynn Questell
Pre-Hearing Officer